PP

v.

BAHARUDDIN MUSTAFFA

HIGH COURT MALAYA, IPOH
VT SINGHAM J
[CRIMINAL TRIAL NO: 45-10-2004]
14 DECEMBER 2005

STATUTORY INTERPRETATION: *Canons of constructions - Generalibus specialia derogant - Possession of dangerous drugs of 50 grams or more in weight - Punishment section - Whether s. 6 or s. 39A(2)(f) Dangerous Drugs Act 1952 - Charge cited s. 39A(2)(f) as punishment section - Whether proper - Dangerous Drugs Act 1952 ss. 6, 39A(2)(f) - Criminal Procedure Code s. 152*

CRIMINAL PROCEDURE: *Sentence - Possession of 424 grams of cannabis - Adequate and appropriate sentence - Dangerous Drugs Act 1952 ss. 6, 39A(2)(f)*

The accused was charged with an offence under s. 6 of the Dangerous Drugs Act 1952 ('the Act') for possession of 424 grams of cannabis punishable under s. 39A(2)(f) of the Act. Before the learned judge, the accused pleaded guilty to the charge and was accordingly convicted by the court. However, whilst making his plea in mitigation, the accused challenged the propriety of the punishment section cited in the charge, namely s. 39A(2)(f), arguing that since s. 6 itself had prescribed the punishment for the offence committed thereunder, the prosecution ought to have preferred that section to that of s. 39A(2)(f). It was further argued that the preference for s. 39A(2)(f) had subjected the accused to a harsher sentence and was therefore prejudicial to the accused. The prosecution contended that the punishment section preferred is correct upon a proper reading of s. 39A(2)(f), especially so when the weight of the cannabis is more than 50 grams. The issue was whether the penalty that the court ought to impose was as provided in s. 6 or s. 39A(2)(f) of the Act.

Held:

[1] Where a written law, such as the Act, has provided a punishment for an offence under its section (s. 6) which is still in existence when a later provision was enacted by way of an amendment providing for another set of punishment for the same offence (s. 39A(2)), it is deemed that the

legislature, before enacting the later punishment provision, has taken into account the existing provision. Consequently, the later and enhanced punishment should prevail, unless there is some express provision in the Act stating otherwise. This being the case, s. 39A(2)(f) of the Act, being the later provision (coming into being by way of Dangerous Drugs Amendment Act A659/86), should prevail. (p. 450 a-c)

[2] There is no doubt that, in so far as the punishment to be applied for an offence under s. 6 when the drugs is 50 grammes or more is concerned, the legislature had intended that s. 39A shall override s. 6 of the Act. It is clear that the punishable section for an offence committed under s. 6 or s. 12(2) of the Act is determined by the weight of the dangerous drugs in the charge. Hence, since the weight of the dangerous drugs is within the prescribed amount under s. 39A(2)(f), the punishment that can be imposed under the law shall only be under s. 39A(2)(f) – and not under s. 6 – notwithstanding that the offence is committed under s. 6. (p. 451 a-b)

[3] Considering the maxim *generalibus specialia derogant*, the general punishable provision in s. 6 must ex necessitate yield to the specific of s. 39A(2). It follows that the punishment provided in s. 6 of the Act is not applicable to the facts and issues herein. (p. 451 d-g)

[4] On the facts and in the circumstances, the accused is sentenced to imprisonment for a term of six years from the date of arrest and ten strokes of the rotan. (p. 454 f)

Case(s) referred to:

Abdul Karim v. Regina; Sundra Singh v. Regina; Loh Kai Hoi v. Regina [1954] 20 MLJ 86 ***(refd)***

Hairul Din Zainal Abidin v. PP [2004] 1 CLJ 129 CA ***(foll)***

Khirul Ihsan Hussain v. PP [1999] 8 CLJ 309 HC ***(foll)***

PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***

PP v. Razlan Hassan [2003] 2 CLJ 156 CA ***(foll)***

PP v. Suryadi Idris [2001] 1 LNS 212 HC ***(refd)***

PP v. Sulaiman Ahmad [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447 HC ***(refd)***

PP v. The Offender [1998] 4 MLJ 152 ***(refd)***

Re HPC Productions Ltd [1962] 2 WLR 51 ***(refd)***

The Liverpool Borough Bank v. Turner 2 DEG F and J [502] ***(refd)***

Tuck v. Priester [1887] 19 QBD 629 ***(refd)***

Yusmarin Samsudin v. PP [1999] 4 CLJ 391 CA ***(foll)***

Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(foll)***

Legislation referred to:
Criminal Procedure Code, s. 152(4)
Dangerous Drugs Act 1952, ss. 6, 12(2), 39A(1)(2), (2)(f), B(1)(a), (2)
Juvenile Courts Act 1947, s. 12(1)

For the AG's Chambers - How May Ling DPP
For the accused - Dr Naran Singh; M/s Naran Singh & Co

Reported by Rose Aziz

JUDGMENT

VT Singham J:
The accused who was originally charged on 16 August 2004 for trafficking in dangerous drugs, being 424 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the said Act. The accused pleaded not guilty to the said charge and the case was fixed for hearing on 5 December 2005 and to be continued for ten days. On 5 December 2005, the learned Deputy Public Prosecutor tendered an alternative charge which is as follows:

> Bahawa kamu pada 24 August 2003 jam lebih kurang 12.30tengah malam di Jalan Pasir Puteh, Ipoh di dalam Daerah Kinta di dalam Negeri Perak, telah memiliki dadah berbahaya, iaitu 424 gram cannabis. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah s. 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39A(2)(f) Akta yang sama.

The accused had pleaded guilty to the alternative charge, an offence under s. 6 of the Dangerous Drugs Act 1952 (hereinafter referred to as 'the DDA Act') for possession of 424 grammes of cannabis and punishable under s. 39A(2)(f) of the said DDA Act. This court having been satisfied that the accused understood the nature and consequences of his plea of guilty and the punishment provided under s. 39A(2)(f) of the DDA Act, accepted his plea of guilty on 5 December 2005 and he was found guilty and convicted under s. 6 of the said DDA Act.

However, during mitigation, on the issue of punishment, learned counsel for the accused in the course of raising the mitigation plea had also challenged the punishable section as mentioned in the charge and submitted as follows:

(1) where the offence committed by the accused provides the punishment in the section as contained in s. 6 of the said DDA Act, the punishment to be imposed should be as contained in the section itself;

(2) the punishable section, being s. 39A(2)(f) of the DDA Act as mentioned in the charge is prejudicial to the accused as he is denied a lesser punishment as provided in s. 6 itself;

(3) the punishment to be imposed against the accused should be the punishment as provided in s. 6 of the DDA Act and not as in s. 39A(2) of the DDA Act as mentioned in the charge;

(4) alternatively, if s. 39A(2)(f) of the DDA Act is applied by this court as the punishable section, he urged upon this court to impose the minimum punishment being five years imprisonment and ten strokes of the rotan.

On the other hand, the learned Deputy Public Prosecutor submitted as follows:

(1) the punishable section as contained in the charge being s. 39A(2)(f) of the DDA Act is the correct section as the weight of the dangerous drugs, namely, cannabis is more than 50 grammes and she referred to s. 39A(2)(f) of the DDA Act where it states:

> Every person found guilty of an offence against this Act where the offence is not punishable with death and where the subject matter of the offence is:
>
> (f) 50 grammes or more in weight of cannabis;
>
> shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes. (emphasis added)

(2) as the dangerous drugs, being cannabis in the instant case and the weight is more than 50 grammes, being 424 grams, the punishment to be imposed is rightfully under s. 39A(2)(f) of the said DDA Act as mentioned in the charge as this section was included by an amendment;

(3) urge upon this court to impose the punishment as provided under s. 39A(2)(f) and not under s. 6 of the said DDA Act;

(4) the learned Deputy Public Prosecutor referred to the Court of Appeal decision in *Hairul Din Zainal Abidin v. PP* [2004] 1 CLJ 129 which supported her argument that s. 39A(2)(f) is the punishable section to be imposed against the accused on the facts in the instant case.

Reply By Defence Counsel

Section 6 of the DDA Act does not state the weight or amount of the dangerous drugs. In other words, the weight of the dangerous drugs is not described. However, learned counsel submitted that this court may perhaps wish to follow the decision of the Court of Appeal in *Hairul Din Zainal Abidin*

v. PP [2004] 1 CLJ 129 and if the court is minded to impose the punishment provided in s. 39A(2)(f) of the DDA Act, he appealed to this court to impose the minimum sentence of five years imprisonment.

Decision Of This Court

The law and section of the law against which the offence was committed by the accused has been expressly mentioned as s. 6 of the DDA Act in the charge as required by s. 152(4) of the Criminal Procedure Code. The alternative charge against the accused is as follows:

> Bahawa kamu pada 24/8/2003 jam lebih kurang 12.30 tengah malam di Jalan Pasir Puteh, Ipoh di dalam Daerah Kinta di dalam Negeri Perak, telah memiliki dadah berbahaya, iaitu 424 gram cannabis. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah **Seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39A(2)(f) Akta yang sama**. (emphasis added)

Section 6 of the DDA Act states as follows:

> Restriction on possession of raw opium, coca leaves, poppy-straw and cannabis.
>
> Any person who keeps or has in his possession, custody or control any raw opium, coca leaves, poppy-straw or cannabis or the seeds of the plants from which they may be obtained either directly or indirectly, except under and in accordance with an authorization such as is referred to in s. 4 and 5 or with any regulation made under s. 7 thereof, shall be guilty of an offence against this Act and liable on conviction to a fine of not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

Section 152 of the Criminal Procedure Code states as follows:

> Form of charge.
>
> (1) Every charge under this Code shall state the offence with which the accused is charged.
>
> (2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.
>
> (3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.
>
> (4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

In the instant case, the charge also includes the punishable section being s. 39A(2)(f) of the DDA Act as applicable to the offence under s. 6 of the DDA Act having been committed by the accused and the weight of the dangerous drugs is 424 grammes. This court is of the view that where the

written law as in the instant case, the Dangerous Drugs Act 1952 has provided the punishment for an offence under s. 6 which is still in existence when a later provision was enacted by way of an amendment, namely s. 39A(2) of the DDA Act, which has provided another set of enhanced punishment for the same offence, it is deemed that the legislature has taken into account the existing punishment when it provided the later punishment provision. Consequently, the later and enhanced punishment introduced by an amendment for certain category of offences or more serious type of cases falling within the relevant class of the offence, where the weight of the dangerous drugs is 50 grammes or more in weight of cannabis as provided in sub-s. (2)(f) should prevail unless there is some other express provision in the Act itself which states otherwise or contrary to the punishment prescribed by the later provision. In the instant case, s. 39A(1) and (2) of the DDA Act being the later provision which were included by an amendment, being the Dangerous Drugs Amendment Act A 659/86 with effect from 1 September 1987 should prevail.

Parliament must have intended s. 39A to possess a great impact on offenders or potential offenders and the courts have been provided with the powers to impose the enhanced punishment where the weight of the drugs, being cannabis in the instant case is more than 50 grammes as provided under s. 39A(2)(f) of the DDA Act against offenders or potential offenders. If Parliament had intended that the punishment for the offence under s. 6 of the said Act is limited or confined exclusively only to the punishment provided in s. 6, it would not have expressly enacted s. 39A(1) and (2) of the DDA Act which is certainly to reflect its firm and strict stand on punishment for offenders who come within the category of s. 39A(1) and (2)(f). Further, if the legislature had intended that the punishment be left to the discretion of the court, it undoubtedly would have made its intentions clear when it enacted s. 39A(1) and (2). To apply the punishment as provided in s. 6 of the DDA Act and as urged upon by learned counsel would defeat and frustrate the intention of the legislature. However, if the legislature had intended that offenders who have committed an offence under s. 6 of the DDA Act are to be punished only by s. 6 itself notwithstanding the weight of the dangerous drugs as defined by s. 39A(2)(f) of the DDA Act, it would have expressly stated so. (See *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441 at p. 447 and *Yusmarin Samsudin v. Public Prosecutor* [1999] 4 CLJ 391 and *Public Prosecutor v. Suryadi Bin Idris* [2001] 1 LNS 212).

The question as raised by learned counsel, whether the penalty to be imposed as provided in s. 6 or as provided by subsequent amendment as provided by s. 39A of the DDA Act is to be answered by reference to the intention of parliament and is to be discerned by application of ordinary principle of statutory construction. This court is of the view that it is the duty of the court to try to get at the real intention of the legislature by carefully and painstakingly

attending to the whole scope of the statute and the purpose behind s. 39A(1) and (2) of the DDA Act which was subsequently enacted and this court cannot doubt that the legislature had intended that s. 39A shall override s. 6 of the DDA Act in so far as what punishment is to be applied for an offence under s. 6 when and the weight of the cannabis is 50 grammes or more. It is clear from the Act that the punishable section for an offence committed under s. 6 or s. 12(2) of the DDA Act is determined by the weight of the dangerous drugs in the charge. Since the weight of the dangerous drugs in the instant case is within the prescribed amount under s. 39A(2)(f) although the offence is committed under s. 6, the punishment that can be imposed under the law shall only be under s. 39A(2)(f) and not under s. 6 as submitted by learned counsel.

In *PP v. Sulaiman Ahmad* [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447, the case referred by learned counsel for the accused, where His Lordship Abdul Malik Hj Ishak JC (as he then was) has stated that the final decision and the sentence to be imposed is within the court's sole jurisdiction, in the respectful view of this court, did not mean and neither was it intended to mean that the court can disregard the punishment provided by law. Accordingly, the sentence to be imposed should no doubt be within the law which has provided the punishment and the court cannot travel outside the express provision of the law. Infact recourse shall be had to the punishment section in s. 39A(2)(f) unless the section provided for the offence in itself has a provision ie, to the effect where the court is given the discretion to choose between the punishment provided in the offence committed by the accused and the enhanced punishment section as introduced by the amendment. It is also important to note that where a special provision is made in a special statute, like s. 39A the Dangerous Drugs Act (Amendment) Act, that special provision shall exclude the operation of the general provision in s. 6 as to the sentence to be imposed for an offence under s. 6 of the DDA Act, in the instant case, the weight of the cannabis is 424 grammes and it comes within the purview of s. 39A(2)(f) of the said DDA Act, [*Generalibus specialia derogant*) is a cardinal principle of statutory interpretation. When Parliament increases penalties to a particular crime by an amendment, it is a signal to which the courts should respond and the punishable section is s. 39A(2)(f) of the said DDA Act which was included by an amendment.

In *Public Prosecutor v. The Offender* [1998] 4 MLJ 152, the juvenile was charged for possession of fifty (50) packets of the adulterated drugs, being 1.8 grammes of heroin and 4.8 grammes of *monoacetylmorphines*. In that case, the Juvenile Courts Act, 1947 (as it was then in force) and presently replaced by the Child Act 2001, gives an option to the Juvenile Court where an offence has been proved against a juvenile either to impose the punishment provided for under s. 12(1) of the Juvenile Courts Act 1947 or impose the

punishment provided for by the law under which the offender is charged. In that case, the learned Sessions Court Judge imposed the punishment under s. 39A(2) as he took the view that s. 39A(2) overrides the provision relating to punishment under the Juvenile Courts Act 1947. On revision, His Lordship K.C. Vohrah J. (as he then was) set aside the sentence imposed under s. 39A(2) of the DDA Act and substituted therefore with an order for the offender to be sent to an approved school as provided under s. 12(1) of the Juvenile Courts Act 1947.

In *Abdul Karim v. Regina; Sundra Singh v. Regina; Loh Kai Hoi v. Regina* [1954] 20 MLJ 86, Brown, Ag. C.J. said:

> The particular offence, and the particular offender, are the concern of the Court, whose business it is to decide what punishment is merited upon the facts of the individual case within the limits which the Legislature has provided.

In *Khirul Ihsan Bin Hussain v. Public Prosecutor* [1999] 8 CLJ 309, the learned Magistrate sentenced the accused to four years' imprisonment from the date of arrest and ordered to be given three strokes of the rotan for possession of 5.95 grammes of heroin, an offence committed under s. 12(2) of the DDA Act and punishable under s. 39A(2) of the DDA Act. On appeal by the accused against the sentence, His Lordship KN Segara J. set aside the four years imprisonment imposed under s. 39A(1) and substituted it with the minimum five years imprisonment and ten strokes of the rotan as provided under s. 39A(2) of the DDA Act. His Lordship said:

> The Act has introduced under s 39A two distinct subsections which provides for mandatory increased penalty in respect of an offence against the Act where the subject matter of the offence is the prescribed amount of certain dangerous drugs.
>
> Now, when a person is charged for an offence under s. 12(2) of the Act relating to certain dangerous drugs of the prescribed amount referred to in s. 39A, then the punishable section under the Act which shall be invoked if he is found guilty of the offence and convicted is determined by the amount (weight) of the subject matter of the charge. For example, if the subject matter of the charge is heroin and its weight is 2 gm or more but less than 5 gm, then the punishable section would be s. 39A(1) of the Act. However, if its weight is 5 gm or more, then the punishable section is s. 39A(2) of the Act.
>
> In this appeal before me, the subject matter of the charge was 5.95 gm of heroin. Therefore, any sentence passed under the provisions of s. 39A(1) of the Act would be patently wrong and unlawful. A valid sentence, in the circumstances, shall only be one meted out under the provisions of s. 39A(2) of the Act. Neither the court nor the Public Prosecutor has any discretion to invoke s. 39A(1) if the subject matter of the charge is not within the prescribed amount under s. 39A(1) of the Act.

In *PP v. Razlan Hassan* [2003] 2 CLJ 156 at p. 165 and 166, His Lordship Alauddin Mohd Sheriff, JCA (now Federal Court judge) said:

> Di dalam keadaan begini pada penghakiman kami tindakan YA hakim meminda pertuduhan asal di bawah s. 39B kepada s. 12(2) yang boleh dihukum di bawah s. 12(3) ADB adalah salah. Tindakan yang sepatutnya diambil oleh YA hakim ialah meminda pertuduhan asal di bawah s. 39B kepada s. 6 yang boleh dihukum di bawah s. 39A(2)(f) ADB 1952.
>
> Memandangkan jumlah berat kesemua dadah tersebut ialah 1,761.7 gm yakni tiga puluh lima (35) kali ganda dari apa yang diperuntukkan oleh s. 39A(2)(f) maka kami berpendapat amatlah wajar pertuduhan asal dipinda mengikut s. 6 yang boleh dihukum di bawah s. 39A(2)(f) tersebut di atas.

In *Hairul Din Zainal Abidin v. PP* [2004] 1 CLJ 129 at p. 137, His Lordship Abdul Aziz Mohamad JCA said:

> Although the penalty prescribed by s. 6 for possession of cannabis is a fine not exceeding twenty thousand ringgit or imprisonment not exceeding five years or both, s. 39A(2) makes mandatory an increased penalty of imprisonment for life or not less than five years and whipping of not less than ten strokes where the dangerous drug involved is of a certain amount. In the case of cannabis, the amount prescribed by para. (f) of s. 39A(2) is 50 grammes or more in weight.

In *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 257, His Lordship Hashim Yeop A. Sani J (as he then was) said:

> In respect of offences under the Dangerous Drugs Ordinance, 1952, there has been a gradual change in the attitude of the legislature during the last few years. The Ordinance has been amended by Parliament a number of times, in 1971 (by Act A112 of 1972) then in 1973 (by Act A194 of 1973) and then in 1975 (by Act A293 of 1975). At the moment there is yet another amendment which is awaiting the Royal Assent. In the legislative exercise in 1973 penalties attached to the various offences under the law were enhanced.
>
> It is common sense to say that behind these legislative exercises was the government's realisation *albeit* gradual, of the problem of drug abuse in this country, the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself. The amendments passed by Parliament therefore reflect the public policy. It must be presumed that behind the public policy is the consideration of public interest.
>
> The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. This is not saying that the courts in the treatment of drug offences should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.

In *Tuck v. Priester* [1887] 19 Q.B.D. 629 at p. 638, Lord Esher MR said:

> We must be very careful in construing this section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction.

Plowman J. in *Re Hpc Produc tions Ltd* [1962] 2 WLR 51 said:

> In construing a penal statute … the question is simply what is the meaning of the words which the statute has used to describe the prohibited act or transaction? If these words have a natural meaning, that is their meaning, and such meaning is not to be extended by any reasoning based on the substance of the transaction. If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted.

In the instant case, the punishment provided in s. 6 of the DDA Act which learned counsel has urged this court to rely on is not applicable to the facts and issue. In the circumstances, the general punishable provision in s. 6 must ex necessitate yield to the specific provisions of s. 39A(2) as to the punishment to be imposed. In *The Liverpool, Borough Bank v. Turner 2 D.E.G. F and J.* [502] at p. 718, Lord Chancellor, Lord Campbell said:

> It is a duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

Having decided on the punishable section as provided by law, in the instant case, which is s. 39A(2) of the DDA Act which should be applied for the offence committed under s. 6 of the DDA Act, what remains is the appropriate sentence which ought to be imposed against the accused. Upon considering the charge, the facts as presented by the prosecution and the mitigating circumstances as raised by the learned defence counsel on behalf of the accused and the submissions of the learned Deputy Public Prosecutor, the accused is sentenced to six years' imprisonment from the date of arrest, (24 August 2003) and the minimum ten strokes of the rotan is ordered to be imposed. As the learned Deputy Public Prosecutor has applied to withdraw the original charge for an offence under s. 39B(1)(a) of the DDA Act, the accused is acquitted and discharged of the said charge.